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Condos, Cats, and CC&Rs: Invasion of the Castle Common

Armand Arabian*

I. INTRODUCTION

The American dream of owning a home usually brings with it the assurance of a peaceful retreat from the demands of the outer world, including its constraints on many lifestyle choices. For those who purchase a condominium or similar residence in a planned development community, however, the expectation of protective insulation is often not realized. Such individuals are subject to the covenants, conditions, and restrictions (CC&Rs) contained in the development's declaration or in the bylaws of its homeowners association (HOA). These restrictions not only impose limitations on conduct in common and publicly visible areas but they also often dictate basic aspects of a resident's mode of living within the privacy of his or her own unit.

A development's rules and regulations are commonly enforced by the association's board of directors, which holds substantial sway over the financial and property interests of residents. Many owners may be completely unaware of such a possibility when purchasing their units. Only after they have moved in and settled down do they discover that the development declaration contains a host of intrusive restrictions affecting their daily lives, including, quite possibly, the prohibition of household animals. Even when pets are confined entirely to an owner's unit and do not impair the quiet enjoyment of others, the board, on behalf of the association, can institute enforcement proceedings and impose

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substantial fines pending capitulation. In most states, the legal system will uphold such actions in all but the most egregious of circumstances.

In *Nahrstedt v. Lakeside Village Condominium Ass'n, Inc.*,¹ I took exception to the California Supreme Court's determination that a virtual ban on pets was not unreasonable and could be enforced against the owner of three cats when the animals remained inside her unit at all times, did not make noise or generate odor, and did not create a nuisance for other residents. Although the authority aggressively wielded by development associations was not at issue in the case, I became convinced that the authority—unrestrained by basic principles of due process or even rationality—threatens fundamental interests heretofore assumed as sacrosanct incidents of home ownership. Given the growing popularity of multi-unit developments and the presumption of reasonableness the law accords recorded restrictions, vast numbers of people are vulnerable to significant limitations on their conduct enforced by their neighbors without accountability or independent review.

In this article, I extrapolate from my dissent in *Nahrstedt* and discuss some of the critical concerns implicated in its holding. I also proffer model legislation designed to protect individual property owners from the specter of unbridled majoritarian domination and to restore a measure of balance in the enforcement of CC&Rs applicable to condominiums and other planned community developments. Such a curative effort may promote harmonious communal living, prevent judicial enmeshment into this emotionally charged area of law, and instigate a national scholarly and legislative debate on the subject.

II. NAHRSTEDT V. LAKESIDE VILLAGE CONDOMINIUM ASS'N, INC.

A. Factual and Procedural Background

In January 1988, Natore Nahrstedt purchased a condominium in Lakeside Village, a large development in Culver City, in Los Angeles.² Lakeside Village consists of 530 units in twelve separate three-story buildings.³ Residents share many common facilities including lobbies, hallways, laundry, and trash services.⁴

As with most common interest communities, ownership interests in Lakeside Village are subject to certain CC&Rs set forth in the developer's declaration.⁵ Upon purchasing a unit, each owner automati-

1. 878 P.2d 1275, 1278-79 (Cal. 1994) (en banc).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

cally becomes a member of the development's homeowners association, the Lakeside Village Association, which enforces the CC&Rs as well as other regulations contained in the bylaws.⁶ Lakeside Village maintains a pet restriction that provides in relevant part: "No animals (which shall mean dogs and cats), livestock, reptiles or poultry shall be kept in any unit."⁷ When Nahrstedt moved into her condominium, she brought along her three cats, which she had owned for many years and which she considered to be her family.⁸ After learning of the cats' presence, the Association demanded Nahrstedt remove them and imposed a fine for each month she remained in violation of the prohibition, for a total in excess of \$6,000.⁹

Nahrstedt denied any prior knowledge of the pet restriction and initiated a lawsuit against the Association for damages and injunctive relief.¹⁰ She contended the restriction was unreasonable as applied because the cats did not penetrate the common areas or otherwise create a nuisance for others.¹¹ The Association demurred, maintaining the pet restriction was enforceable because it furthered the "collective health, happiness and peace of mind" of those living in the development.¹² The trial court sustained the demurrer and dismissed the action on that basis.¹³ The court of appeal reversed, concluding the test of reasonableness depended on the facts of each case. In the majority's view, the pet restriction was not reasonable when measured against the allegations in Nahrstedt's complaint.¹⁴ The dissenting justice criticized this

6. *Id.*

7. *Id.* The CC&Rs permit residents to keep domestic fish and birds. *Id.* at 1278 n.3.

8. *See id.* at 1278-79.

9. *Id.*

10. *Id.* Nahrstedt also filed suit against the Association's officers and two of its employees. *Id.* The original suit sought invalidation of the assessments, an injunction against future fines, and damages for violation of her privacy. *Id.* at 1279.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* Consistent with other appellate decisions, the majority interpreted California Civil Code § 1354 as imposing the following standard of reasonableness: "Reasonable and enforceable restrictions are those which prohibit conduct which, while otherwise lawful, in fact interferes with, or has a reasonable likelihood of interfering with, the rights of other condominium owners to the peaceful and quiet enjoyment of their property." CAL. CIV. CODE § 1354 (West Supp. 1995); *see Portola Hills Community Ass'n v. James*, 5 Cal. Rptr. 2d 580 (Ct. App. 1992) (stating that reasonableness is a question of law); *Bernardo Villas Management Corp. v. Black*, 235 Cal. Rptr. 509, 510

case-by-case assessment, arguing it conflicted with the California Legislature's intent to make CC&Rs presumptively enforceable.¹⁵ The California Supreme Court granted review to decide upon what basis a condominium owner can prevent enforcement of a recorded restriction.¹⁶

B. California Supreme Court Majority Opinion

The California Supreme Court's majority¹⁷ categorically rejected the court of appeal's "as applied" approach and held that under the provisions of Civil Code section 1354, CC&Rs are presumptively valid and not subject to challenge on the basis of individual considerations.¹⁸ Citing the recent dramatic increase in the number of condominiums, co-operatives, and planned unit developments with HOAs,¹⁹ the majority noted that common interest developments (CIDs) have become a widely

(Ct. App. 1987) (stating that "restrictions become equitable servitudes unless unreasonable"). California Civil Code § 1354(a) provides:

The covenants and restrictions in the declaration [of a common interest development] shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development. Unless the declaration states otherwise, these servitudes may be enforced by any owner of a separate interest or by the association, or by both.

CAL. CIV. CODE § 1354(a) (West Supp. 1995).

15. *Nahrstedt*, 878 P.2d at 1279; see *Nahrstedt v. Lakeside Village Condominium Ass'n*, 11 Cal. Rptr. 2d 299, 312-15 (Ct. App. 1992) (Hinz, J., dissenting), *rev'd*, 878 P.2d 1275 (Cal. 1995) (en banc).

16. *Nahrstedt*, 878 P.2d at 1279.

17. Justice Kennard authored the opinion in which the remainder of the court, except me, concurred. *Id.* at 1275.

18. *Id.* This validity assumes, of course, compliance with any applicable procedural requirements such as proper recordation. See, e.g., CAL. CIV. CODE § 1353 (West Supp. 1995).

19. *Nahrstedt*, 878 P.2d at 1279. After 1960, land and construction prices increased markedly, leading to the heightened interest in common interest housing. STEPHEN E. BARTON & CAROL J. SILVERMAN, HOMEOWNERSHIP IN THE COMMON-INTEREST DEVELOPMENT 3-8 (Inst. of Urban and Regional Dev. Working Paper No. 469, 1987). In addition, Congress enacted the National Housing Act of 1961, encouraging and facilitating condominium ownership by making federal mortgage insurance available for their purchase. 15A AM. JUR. 2D *Condominiums and Cooperative Apartments* § 7 (1976). Regardless of form, all utilize some type of homeowners association, also referred to as residential community associations, to govern and manage their affairs. Robert B. Hawkins, Jr., *Preface to RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM?* at i (Advisory Comm'n on Intergovernmental Relations, 1989). In 1992, there were an estimated 150,000 homeowners associations in the United States managing 11.6 million individual units, mostly located in California and Florida. Karen E. Klein, *Living on Common Ground, Condominium Association: The New Neighborhood*, L.A. TIMES, Feb. 26, 1995, at K1 (pt. 1).

accepted form of real property ownership.²⁰ Owners enjoy many advantages associated with having their own residence while also acquiring "an interest in the amenities and facilities included in the project."²¹ This dual aspect of ownership accounts in large measure for their popularity.²²

The creation of many severable interests in one property development requires the preparation of a declaration setting forth the CC&Rs that will eventually govern residents and that may limit and control their use of both the common and individually owned areas.²³ This

20. *Nahrstedt*, 878 P.2d at 1279. Common interest developments are the fastest growing form of housing in the nation, with one of every eight Americans now living in this type of residence. Karen E. Klein, *Code Blues: Rules That Govern Life in Homeowners Associations Are Being Challenged in Court by Angry Owners*, L.A. TIMES, Mar. 5, 1995, at K1 (pt. 2) (citing a study by the Community Associations Institute). As of 1988, approximately 29 million people live in some form of CID, including condominiums, cooperatives, and planned unit developments. This wide acceptance has been labeled the "community association phenomenon." C. James Dowden, *Community Associations and Local Governments: The Need for Recognition and Reassessment in RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM?* 27, 27 (Advisory Comm'n on Intergovernmental Relations, 1989).

21. *Nahrstedt*, 878 P.2d at 1279. In California, for example, CIDs provide a variety of facilities and services not otherwise available or affordable to the average single-family home owner, including lawn care and gardening, parks and playgrounds, meeting places, garbage collection, parking lots or structures, swimming facilities, water and sewer lines, and entry guards and security patrols. Stephen E. Barton & Carol J. Silverman, *History and Structure of the Common Interest Community*, in COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENTS AND THE PUBLIC INTEREST 3, 4-6 (Stephen E. Barton & Carol J. Silverman eds., 1994). Since CIDs may be able to provide better delivery of local services as well as offer improved efficiency of metropolitan land use and neighborhood conditions, unit owners may enjoy not only higher property values but also a better quality of life. Robert H. Nelson, *The Privatization of Local Government: From Zoning to RCAs*, in RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENT IN THE INTERGOVERNMENTAL SYSTEM? 45, 50 (Advisory Comm'n on Intergovernmental Relations, 1989). At the same time, however, developers may use amenities to target certain economic or other specific groups for a particular project, leading to or exacerbating neighborhood segregation. *Id.*

22. *Nahrstedt*, 878 P.2d at 1279.

23. *Id.* at 1281. The document typically describes the property, specifies which areas are commonly or individually owned, and enumerates the restrictions applicable to use of the common areas and facilities. *Id.* Among other items, restrictions most often relate to architectural design and fencing, use of structures, use of common property, subdivision of lots, limitation on persons who may occupy a single unit, and restriction or prohibition of household pets. Clayton P. Gillette, *Mediating Institutions: Beyond the Public/Private Distinction—Courts, Covenants, and Communities*,

document is recorded prior to the sale of any individual unit. Because the intended purpose of CC&Rs is to promote the health and happiness of the majority of unit owners,²⁴ they are "an inherent part of any common interest development and are crucial to the stable, planned environment of any shared ownership arrangement."²⁵ Mandatory membership in a HOA is typically incident to common interest property ownership.²⁶ Acting on the association's behalf, an elected board of directors enforces property use restrictions and other regulations. Because their function allows these boards to exercise considerable control over many aspects of everyday life, they "must guard against the potential for the abuse of that power."²⁷ Nevertheless, in the majority's view, anyone purchasing a unit in a CID with knowledge of the HOA's enforcement authority accepts the possibility it may be exercised for the purported benefit of the community, even if it is to the detriment of the individual.²⁸ In addition to affordability, this mutual enforceability of

61 U. CHI. L. REV. 1375, 1384-85 (1994). For an example of a declaration of CC&Rs for a CID development, see generally Gurdon H. Buck, *Drafting Documents for Condominiums, PUDs, and Golf Course Communities*, C924 A.L.I.-A.B.A. 117, 133-83 (1994) (including an exhibit by Wayne S. Hyatt, Declaration of Covenants, Conditions, and Restrictions for Pleasant View).

24. *Nahrstedt*, 878 P.2d at 1282.

25. *Id.* at 1275.

26. *Id.*; see CURTIS C. SPROUL & KATHARINE N. ROSENBERRY, ADVISING CALIFORNIA CONDOMINIUM AND HOMEOWNER ASSOCIATIONS § 2.20 (1991). Characteristics of all community associations include mandatory membership of owners, consent to authority for enforcement of restrictions governing the use of property, and maintenance of the property. See EVAN MCKENZIE, PRIVATOPIA, 126-49 (1994). In mandatory HOAs, board members generally are responsible for enforcing rules relating to maintenance of the common property and financing the community's activities through property owner assessments. Barton & Silverman, *supra* note 21, at 31; see also WARREN FREEDMAN & JONATHAN B. ALTER, THE LAW OF CONDOMINIA AND PROPERTY OWNERS' ASSOCIATIONS, 21-38, 109-26 (1992) (discussing the nature of property owners associations and the regulations governing them).

27. *Nahrstedt*, 878 P.2d at 1281-82. Some commentators have noted these governing boards tend to become places "where people who like control can go and have a sense of control." Mike Bowler & Evan McKenzie, *Invisible Kingdoms*, CAL. LAW., Dec. 1985, at 56 (quoting homeowner association lawyer Thomas E. Miller). "These are mini-governments which in some respects have more power than governments" *Id.* at 55 (quoting author Richard Louv); see MCKENZIE, *supra* note 26, at 122 ("[H]omeowner associations have full legal rights, limited responsibility for the individuals who operate them, a potentially infinite lifespan, and a dedication to . . . protection of property values. In carrying out this purpose, homeowner associations function as private governments.").

28. *Nahrstedt*, 878 P.2d at 1282. Although purchasers receive constructive notice by virtue of recordation, in many instances they may be unaware of the breadth of discretionary power exercised by the HOA because of the boilerplate language the declarations typically utilize. See Barton & Silverman, *supra* note 21. See generally Carl B. Kress, Comment, *Beyond Nahrstedt: Reviewing Restrictions Governing Life in a*

CC&Rs against future as well as current homeowners is a primary advantage of common interest property ownership and accounts for the recent increase in popularity of CIDs.²⁹

The majority next turned to California's governing law, the Davis-Stirling Common Interest Development Act (the Act), which addresses various aspects of CIDs, including CC&Rs.³⁰ Pursuant to the Act, "[t]he covenants and restrictions in the declaration [of a CID] shall be enforceable equitable servitudes, unless unreasonable."³¹ Under the majority's interpretation, this language manifests a legislative intent in favor of enforceability, according recorded use restrictions the same effect as equitable servitudes by making them binding against current and subsequent purchasers without actual notice.³² Such deference to broad applicability reinforces and enhances stability and predictability in CIDs since it both conforms to owners' expectations as to the use of their property and protects them from unexpected fee increases.³³ In construing Civil Code section 1354, the majority placed the burden on the individual to establish unreasonableness and declined to permit challenges on a case-by-case basis; only the validity of a particular restriction in the abstract is subject to attack.³⁴ This interpretation avoids the financial drain on HOA resources and other disadvantages that might arise from frequent litigation over the enforceability of CC&Rs.³⁵

Property Owner Association, 42 UCLA L. REV. 837 (1995) (discussing restrictions of property owner associations and recommending that courts evaluate restrictions and uphold those that are nonintrusive and voluntary).

29. *Nahrstedt*, 878 P.2d at 1282.

30. *Id.* at 1284; see CAL. CIV. CODE §§ 1350-1374 (West 1982 & Supp. 1995). The Act was passed in 1985. Common interest developments are composed of community apartment projects, condominium projects, planned developments, and stock cooperatives. *Nahrstedt*, 878 P.2d at 1284 n.7.

31. *Nahrstedt*, 878 P.2d at 1284-85 (citing CAL. CIV. CODE § 1354(a) (West 1982 & Supp. 1995)). Restrictions enforceable under this provision must meet the requirements of equitable servitudes or covenants running with the land. *Id.* at 1283. If they do not, enforceability depends upon actual notice. *Id.* Not all states apply the same standard; some enforce restrictions regardless of actual or constructive notice as long as they are "reasonable," meaning that they "further[] the collective 'health, happiness and enjoyment of life' of owners of a common interest development." *Id.* at 1279 (quoting the Association's Points and Authorities in support of its demurrer to the complaint).

32. *Id.* at 1285. Inclusion of restrictions in a declaration recorded with the county recorder provides sufficient notice to bind subsequent purchasers. *Id.*

33. *Id.* at 1286-87.

34. *Id.* at 1289.

35. *Id.* at 1288-89.

The court did acknowledge, however, that covenants violating public policy or causing harm disproportionate to their benefit are unreasonable within the meaning of the statute.³⁶

Applying these principles to Nahrstedt's claims, the majority criticized the court of appeal's reliance on *Bernardo Villas Management Corp. Number Two v. Black*³⁷ and *Portola Hills Community Ass'n v. James*,³⁸ rejecting the case-by-case reasonableness inquiry as inconsistent with the language and intent of Civil Code section 1354.³⁹ The standard for determining reasonableness should be made "not by reference to facts that are specific to the objecting homeowner, but by reference to the common interest development as a whole,"⁴⁰ and use restrictions should be applied uniformly against all residents. Thus, "courts must enforce the restriction unless the challenger can show that the restriction is unreasonable because it is arbitrary, violates a fundamental public policy, or imposes burdens on the use of the affected property that substantially outweigh the restriction's benefits."⁴¹ In view of the competing interests involved, the majority considered this approach essential to the success of CIDs.⁴²

Applying the standard to the Lakeside Village prohibition of household animals, the court denied Nahrstedt relief because "[a]s a matter of law, . . . the recorded pet restriction . . . is not arbitrary, but is rationally related to health, sanitation and noise concerns legitimately held by residents."⁴³ The court noted the pet restriction may have attracted

36. *Id.* at 1286. Examples include restrictions based on race, religion, color, ancestry, national origin, or disability. *Id.* In addition, if a restriction bears "no rational relationship to the protection, preservation, operation or purpose of the affected land," it is unenforceable. *Id.* at 1286-87 (citing *Laguna Royale Owners Ass'n v. Darger*, 174 Cal. Rptr. 136, 142 (Ct. App. 1981)).

37. 235 Cal. Rptr. 509 (Ct. App. 1987); see *supra* note 14 and accompanying text.

38. 5 Cal. Rptr. 2d 580 (Ct. App. 1992); see *supra* note 14 and accompanying text.

39. *Nahrstedt*, 878 P.2d at 1290. In *Bernardo Villas*, the HOA maintained a restriction against "keeping any 'truck, camper, trailer, boat . . . or other form of recreational vehicle' in the carports." *Id.* at 1289 (quoting *Bernardo Villas*, 235 Cal. Rptr. at 509). The subject restriction in *Portola Hills* banned satellite dishes. *Id.* In each case, the court of appeal found enforcement efforts unreasonable as applied because the homeowner's conduct, even though contrary to the CC&Rs, did not impair the enjoyment of others in the use of their property. *Id.* at 1289-90. According to the *Nahrstedt* majority, this analysis failed to apply the relevant principles of equitable servitudes. *Id.* at 1290.

40. *Id.* at 1289-90.

41. *Id.* at 1289-92.

42. *Id.* at 1291.

43. *Id.* at 1290. In addition, the court noted Nahrstedt's complaint did not allege any facts showing that the burden of the restriction outweighed its benefits. *Id.* at 1291. Finally, the restriction did not violate public policy because no state or federal provision confers a right to keep household pets in condominiums. *Id.* at 1290-91.

many purchasers to the community.⁴⁴ Moreover, since residents could change the restriction, their inaction manifested a desire to maintain its enforcement.⁴⁵

C. *The Dissent*

Although I did not quarrel with the majority's construction of Civil Code section 1354 in the abstract, I took exception to its conclusions as to the enforceability of the Lakeside Village pet restriction, which I found patently arbitrary and unreasonable. The analysis failed to consider the integral role household animals have come to play in the lives of human beings regardless of age, economic status, or any other distinguishing factor. In imposing a total prohibition even for pets like Nahrstedt's that created no nuisance for other residents, the CC&Rs substantially burdened those many individuals deprived of their valued companionship without a corresponding benefit to the community as a whole. Liberally construing the pleadings "with a view to substantial justice between the parties,"⁴⁶ the complaint sufficiently alleged the unreasonableness of the pet restriction to allow the action to go forward.⁴⁷

As partially chronicled in my dissent, the relationship between human beings and their pets is a long, well-established tradition of companionship and service. Both young and old benefit from their friendship and loyalty, which may help overcome many hours of loneliness. Children learn responsibility and discipline by taking care of a pet and adults receive a sense of security.⁴⁸ Service dogs assist the blind, deaf, and

Yet, California Health and Safety Code § 19901 does permit disabled and elderly individuals to possess household pets and precludes landlords from refusing to rent to them on that basis. *Id.* at 1291 n.12; see CAL. HEALTH & SAFETY CODE § 19901 (West 1992).

44. *Nahrstedt*, 878 P.2d at 1292 (Arabian, J., dissenting).

45. *Id.* (Arabian, J., dissenting).

46. *Id.* at 1293 (Arabian, J., dissenting) (citing CAL. CIV. PROC. CODE § 452) (West 1973 & Supp. 1995).

47. *Id.* (Arabian, J., dissenting). In her complaint, Nahrstedt alleged she never released her cats from the confines of her unit; furthermore, they made no noise, did not generate any odors, and did not create any other type of nuisance. *Id.* (Arabian, J., dissenting). For purposes of reviewing the ruling on the Association's demurrer, the court was bound to accept these averments as true. *Id.* (Arabian, J., dissenting) (citing *Long Beach Equities, Inc. v. County of Ventura*, 282 Cal. Rptr. 877, 881-82 (Ct. App. 1991), *cert. denied*, 112 S. Ct. 3027 (1992)).

48. *Nahrstedt*, 878 P.2d at 1295 (Arabian, J., dissenting).

disabled in living fuller, more productive lives. Pets also provide important therapeutic benefit for those who suffer from serious disease or are confined to their home.⁴⁹ While pet ownership may not be a fundamental right, its importance to the daily well-being and enjoyment of many people is undeniable.⁵⁰ In my view, the majority's failure to consider the significant and substantial role household animals play in the larger context of human affairs fatally undermined the conclusion that the restriction did not impose an undue burden imposed on some condominium owners while providing a minimal benefit to the community at large.⁵¹ It appeared obvious that prohibiting animals cannot in any respect foster the "health, happiness [or] peace of mind" of others who do not see, hear or smell them.⁵² I found this absence of a nexus between burden and benefit to be the essence of unreasonableness under Civil Code section 1354, as construed by the majority.⁵³

Moreover, the pet restriction itself, with an exception for domestic birds and fish, was inherently inconsistent and even contradictory as to the Association's proffered justification.⁵⁴ Birds are capable of making noises resulting in the kind of disturbance the restriction presumably is intended to prevent.⁵⁵ Bird droppings may create a health hazard when placed in common trash areas.⁵⁶ Similarly, maintenance of fish may lead to problems, such as tank leakage, that cause damage both to other units and the common areas.⁵⁷ Thus, when applied to Nahrstedt's ownership of three household cats, the rationale that the pet restriction must be enforced for "the health, sanitation and noise concerns of other unit owners" cannot be reconciled with the express exceptions the majority impliedly recognized as permissible under Lakeside Village's CC&Rs.⁵⁸

Witnessing the majority cloak essentially all CC&Rs in a presumption of validity and concomitantly accord virtual sovereignty to the HOAs that enforce them, I realized the individual unit owner in any CID in this state had little, if any, control over many intimate aspects of per-

49. *Id.* (Arabian, J., dissenting).

50. *Id.* (Arabian, J., dissenting).

51. *Id.* (Arabian, J., dissenting).

52. *Id.* (Arabian, J., dissenting).

53. *Id.* (Arabian, J., dissenting).

54. *Id.* (Arabian, J., dissenting).

55. *Id.* (Arabian, J., dissenting). In contrast, some animals prohibited by the restriction are actually incapable of making any sound whatsoever, including hamsters, turtles, and small reptiles. *Id.* (Arabian, J., dissenting).

56. *Id.* (Arabian, J., dissenting). Like other household animals, birds are also capable of carrying disease and aggravating allergies in humans. *Id.* (Arabian, J., dissenting).

57. *Id.* (Arabian, J., dissenting).

58. *Id.* at 1295-96 (Arabian, J., dissenting).

sonal lifestyles most homeowners take for granted. Not only is virtually every development declaration created by a business enterprise that may have no residential interest in the property and primarily seeks to maximize its financial return, but actual notice is irrelevant to enforceability. In my estimation, the reasoning and result in *Nahrstedt* illustrated a matter of increasing concern both for those who choose and those who have no choice but to purchase their residential property in a CID. Their individual rights and interests may be sharply curtailed by CC&Rs they have little ability to modify. At the same time, they may find themselves at the mercy of their HOAs, which have the authority pursuant to the majority's construction of Civil Code section 1354 articulated in *Nahrstedt* to intrude into many everyday activities in the guise of enforcing CC&Rs, with little accountability, much less due process. This realization prompted my research into possible means for striking a balance between the governing power accorded these HOAs and the individual freedoms of their members.⁵⁹

III. STANDARDS OF ENFORCEABILITY

Most courts assessing the enforceability of CC&Rs found in CID declarations have adopted a standard of reasonableness.⁶⁰ While often formulated in similar terms, application of the test can differ depending in part on whether the source is statutory or judicial. Alternatively, some courts utilize a corporate analogy, applying the business judgment rule to HOA enforcement actions, either exclusively or in conjunction with a variant of the reasonableness standard. Regardless of the test used, however, the decisions most commonly uphold the restriction against the individual owner.

A. *The Reasonableness Standard*

As noted, review under the reasonableness standard follows either statutory mandate or decisional authority.⁶¹ Depending upon its origins, the test may vary in three respects: (1) how the court defines reason-

59. *Id.* at 1296-97 (Arabian, J., dissenting).

60. See *infra* notes 62-69 and accompanying text.

61. Unless formulating a hybrid test, courts implementing a reasonableness standard generally have not considered the business judgment rule as a possible alternative measure of judicial review. For a discussion of the business judgment rule, see text accompanying *infra* notes 86-110.

ableness; (2) which party has the burden of proof on the issue; and (3) whether any presumption of validity prevails.

The Florida District Court of Appeal, lacking legislative guidelines, was one of the first to adopt a reasonableness standard in the landmark case of *Hidden Harbour Estates, Inc. v. Norman*.⁶² The challenged restriction prohibited alcohol in the common areas.⁶³ In upholding the HOA enforcement action, the court formulated the following test: "[T]he association is not at liberty to adopt arbitrary or capricious rules bearing no relationship to the health, happiness and enjoyment of life of the various unit owners."⁶⁴ Nonetheless,

inherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property.⁶⁵

Although the opinion did not expressly allocate the burden of proof, the analysis implied the HOA must assume responsibility for establishing the reasonableness of a particular restriction.⁶⁶ The court noted the application of this test implicated a case-specific inquiry and lacked a uniform standard for determining the validity of HOA decisions.⁶⁷ Despite these potential disadvantages, many other states have adopted a similar approach, usually by judicial imposition.⁶⁸

62. 309 So. 2d 180 (Fla. Dist. Ct. App. 1975).

63. *Id.* at 181.

64. *Id.* at 182.

65. *Id.* at 181-82.

66. *See id.* at 182.

67. *Id.*

68. For instance, in *Ryan v. Baptiste*, 565 S.W.2d 196 (Mo. Ct. App. 1978), the Missouri Court of Appeals upheld as reasonable the HOA's installation of locks on all doors to the common areas because the HOA balanced the respective interests of the individual condominium owner and the community as a whole. *Id.* at 198. Based on reports of vandalism, the concern for protecting the community reasonably outweighed any slight inconvenience to individual homeowners, particularly since individuals when purchasing property in a CID commonly relinquish some traditional property rights to the HOA's board. *Id.*

Moreover, in *Holleman v. Mission Trace Homeowners Ass'n*, 556 S.W.2d 632 (Tex. Civ. App. 1977), the court upheld a restriction prohibiting homeowners from parking any vehicle overnight on driveways leading to their garages. *Id.* at 636. The court's rationale included a variety of considerations: the limitations inherent in CID property ownership, the stated purpose contained in the declaration authorizing the board to act, and the board's determination that "aspects of aesthetics, safety, security, and convenience" necessitated the regulation. *Id.*

In *Dulaney Towers Maintenance Corp. v. O'Brey*, 418 A.2d 1233 (Md. Ct. Spec. App. 1980), the court applied the same reasonableness test in determining the HOA board acted within its authority when it passed a prospective regulation restricting unit owners to only one pet. *Id.* at 1235. The court found this result consistent with

Subsequently, in *Hidden Harbour Estates, Inc. v. Basso*,⁶⁹ the same court articulated a distinction in applying the reasonableness test.⁷⁰ The court identified two categories of regulations: those in place before an association was formed—usually the CC&Rs contained in the CIDs declaration—and those later adopted by the HOA's Board of Directors.⁷¹ Restrictions in the first category are often compared to a covenant running with the land because the buyer is put on notice of the restrictions at the time of purchase.⁷² They are presumed valid unless wholly arbitrary in application, violative of public policy, or incompatible with a fundamental constitutional right.⁷³ The main policy reason for this virtually categorical enforcement is to protect the reliance interests of those purchasing their property, who expect the HOA will maintain the recorded CC&Rs consistent with the common scheme.⁷⁴ Under this rationale, essentially any restriction will pass muster, even, as the court recognized, ones that "have a certain degree of unreasonableness"⁷⁵ and thus may substantially impinge on the personal lifestyle of individual owners within the confines of their own units.⁷⁶

the deferential approach usually taken with respect to restrictions pertaining to household animals. *Id.* at 1235-36.

69. 393 So. 2d 637 (Fla. Dist. Ct. App. 1981).

70. *Id.* at 639.

71. *Id.* at 639; see also Kress, *supra* note 28, at 837. The appellate court of Massachusetts noted a similar distinction in applying the reasonableness test in *Noble v. Murphy*, 612 N.E.2d 266 (Mass. App. Ct. 1993). There, the court distinguished between regulations appearing in the original documents such as covenants running with the land, which are subject to more liberal review, and those put into effect by the board of directors, which are subject to a more stringent reasonableness test. *Id.* at 270-71.

72. *Basso*, 393 So. 2d at 640.

73. *Id.*

74. *Id.* Another underlying premise is that owners purchase their units with knowledge of the existence of a written declaration and, as a matter of law, accept its express restrictions. *Id.* at 639; see Lewis A. Schiller, *Limitations on the Enforceability of Condominium Rules*, 22 STETSON L. REV. 1133, 1151 (1993). In reality, however, it is questionable whether either real estate agents or purchasers are aware of significant details contained in these often long and tedious documents. See Adriane B. Miller, *The Fine Print in Community Codes Can Deflate Dreams*, BALTIMORE MORNING SUN, Aug. 7, 1994, at 1K (describing a situation in which a Maryland buyer who moved into a condominium with a dog and, like the plaintiff in *Nahrstedt*, only later learned of a restriction prohibiting all pets).

75. *Basso*, 393 So. 2d at 640.

76. In *Nahrstedt*, the majority construed California Civil Code § 1354 to accomplish the same effect by according all CC&Rs a presumption of validity. 878 P.2d at 1275, 1292 (Cal. 1994) (en banc). Thus, a reviewing court need not—indeed cannot—assess

The second category, those promulgated by the board that become part of the CID's bylaws, fall under the standard established in *Hidden Harbour Estates, Inc. v. Norman*.⁷⁷ Thus, an association board has the power only to enact rules and regulations "reasonably related to the promotion of the health, happiness and peace of mind of the unit owners."⁷⁸ Absent the presumption of validity, the board's decision-making authority is more circumscribed to ensure the enacted rules benefit the entire HOA.⁷⁹ Again, the court did not expressly allocate the burden of demonstrating reasonableness; however, the tenor of its analysis quite clearly, if impliedly, assigns to the individual unit owner in the case of recorded CC&Rs and to the HOA's board of directors in other cases.⁸⁰

In contrast to the foregoing decisions, the California Supreme Court in *Nahrstedt v. Lakeside Village Condominium Ass'n, Inc.*⁸¹ formulated its reasonableness standard in conformance with legislative mandate.⁸² Initially, the court construed the statutory language to hold that CC&Rs "should be enforced unless they are wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit."⁸³ The court then determined that a prior amendment changing enforceability from "where reasonable" to "unless unreasonable" created a presumption of validity, thereby shifting the burden of proof to the person challenging the restriction.⁸⁴ Finally, the court adopted a standard of uniformity, expressly rejecting the case-by-case approach of the lower courts.⁸⁵ Although *Nahrstedt* in-

the impact of a restriction on unit owners or question whether it actually protects "health and happiness." *Id.* at 1296 (Arabian, J., dissenting). Under this analysis, it is difficult to imagine a CC&R that "would not pass muster." *Id.* (Arabian, J., dissenting).

77. 309 So. 2d 180, 182 (Fla. Dist. Ct. App. 1975) ("If a rule is reasonable the association can adopt it, if not, it cannot.").

78. *Basso*, 393 So. 2d at 640.

79. In *Basso*, the court declined to allow enforcement of a regulation implemented by the HOA board of directors prohibiting condominium owners from drilling wells, which the board claimed might increase the salinity of ground water, stain the sidewalks, or influence other unit owners to build wells. *Id.* When the Bassos drilled a well, which was contrary to the association board's directive, the latter filed suit for injunctive relief. *Id.* Applying the reasonableness standard, the court ruled the board had not met its burden of proving the restriction was reasonably related to the proffered health and safety objectives. *Id.* at 640. The evidence at trial failed to show that the Bassos' well caused any of the identified problems. *Id.*

80. *Id.* at 640.

81. 878 P.2d 1275 (Cal. 1994) (en banc); see *supra* notes 2-59 and accompanying text.

82. *Nahrstedt*, 878 P.2d at 1283-84; see *supra* note 18 and accompanying text.

83. *Nahrstedt*, 878 P.2d at 1287.

84. *Id.* at 1286.

85. *Id.* at 1289-90.

volved recorded CC&Rs, the sweep of the analysis impliedly embraces bylaws and similar unrecorded regulations as well.

B. *The Business Judgment Standard*

New York has rejected the reasonableness standard and has become the leading proponent of the business judgment rule.⁸⁶ Pursuant to this standard, courts do not inquire into the reasonableness of a CC&R or decision by the HOA board of directors, but instead apply the same measure used for evaluating corporate board decisions.⁸⁷ Rather than focusing on the interests of the individual or the larger CID community, this standard looks to any advantage afforded the board. Thus, not only are personal interests subject to serious restriction, judicial validation of the board's enforcement actions does not even depend upon a finding they benefit the community as a whole.⁸⁸ "If the corporate directors' conduct is authorized, a showing must be made of fraud, self-dealing or unconscionable conduct to justify judicial review."⁸⁹ Consequently, courts will uphold restrictions unless they are "the result of fraud, dishonesty or incompetence."⁹⁰

In adopting the business judgment standard, the New York Court of Appeals in *Levandusky v. One Fifth Avenue Apartment Corp.*⁹¹ consid-

86. See Kress, *supra* note 28, at 863-69. *Levandusky v. One Fifth Avenue Apartment Corp.*, 553 N.E.2d 1317 (N.Y. 1990), was the first New York Court of Appeals decision to implement the business judgment rule. *Id.* at 863 n.138.

87. See Schiller, *supra* note 74, at 1149-50.

88. See generally Randolph C. Gwirtzman, Note, *An Exception to the Levandusky Business Judgment Rule: Owner and Shareholder Interests in Condominium and Cooperative Board Decisions*, 14 CARDOZO L. REV. 1021 (1993) (arguing the business judgment rule is too restrictive for decisions involving lifestyle and the home because they affect an owner's personal liberties; CID board decisions have a more significant impact on the everyday life of homeowners than corporate decisions have on shareholders, but the HOA's board remains unfettered in its authority as long as its actions are not done in bad faith).

89. *Papalexio v. Tower W. Condominium*, 401 A.2d 280, 286 (N.J. Super. Ct. Ch. Div. 1979).

90. *Id.* (citing *Sarner v. Sarner*, 162 A.2d 117, 127 (N.J. Super. Ct. App. Div. 1960), *on subsequent appeal*, 185 A.2d 821 (N.J. 1962) (resolving issue of counsel fees)).

91. 553 N.E.2d 1317 (N.Y. 1990); see Gwirtzman, *supra* note 88, at 1038 (discussing the New York Court of Appeals' justification of judicial economy in deciding to adopt the business judgment test as the standard in disputes between individual unit owners and HOAs over enforcement of CC&Rs); see also *Cannon Point N., Inc. v. Abeles*, 612 N.Y.S.2d 289, 290 (N.Y. App. Div. 1993) (approving the lower court's use of the business judgment standard in refusing to review a restriction prohibiting installation

ered the competing concerns of the board to act with unfettered discretion within the scope of its authority and of the homeowners to have protection from abuse of this power when exercised at the expense of their individual, or even collective, interests.⁹² Although acknowledging the potential for abuse inherent in the board's power to restrict many rights normally incident to property ownership, the court also noted that an individual voluntarily submits to the board's authority by choosing to purchase a CID unit.⁹³ Because the board's function is to manage the community for the benefit of residents, the balance of interests favors deferential judicial review of the board's day-to-day assessment of the proper discharge of its responsibilities.⁹⁴ In the court's view, the business judgment rule, rather than the reasonableness standard, better accommodated the multiplicity of interests involved and relieved the courts of determining the prudence of management decisions, a job they were ill-equipped to do.⁹⁵ "[B]y definition the responsibility for business judgments must rest with the corporate directors; their individual capabilities and experience peculiarly qualify them for the discharge of that responsibility."⁹⁶ Under this standard, the burden of proof falls to the individual challenging a restriction to show the board breached its fiduciary duty or otherwise acted improperly.

To its advantage, the business judgment standard preserves board authority and deters lawsuits that the reasonableness standard might otherwise permit or at least encourage.⁹⁷ Concomitantly, the narrow scope of judicial review obviously disadvantages the individual owner to

of washing machines and dryers in individual units; since the board expressed concern for the detrimental effect on the building's plumbing, the decision was within the scope of its authority and in good faith); *Smukler v. 12 Lofts Realty, Inc.*, 576 N.Y.S.2d 862, 863 (N.Y. App. Div. 1991) (holding the business judgment rule does not prevent judicial review if the board acted in bad faith). *But see generally* *Croton River Club, Inc. v. Half Moon Bay Homeowners Ass'n*, 145 B.R. 185 (Bankr. S.D.N.Y. 1992) (applying the reasonableness standard to a board's decision to set an individual member's share of the budget at a rate higher than other unit owners because the business judgment rule did not apply when the board singled out one member for disparate treatment), *aff'd*, 162 B.R. 648 (S.D.N.Y. 1993), *aff'd in part, modified in part*, 52 F.3d 41 (2d Cir. 1995).

92. *Levandusky*, 553 N.E.2d at 1320-21. Apparently, no New York statutory authority addresses the appropriate standard.

93. *Id.*

94. *Id.* at 1321.

95. *Id.* at 1321-23.

96. *Id.* at 1322 (internal quotation marks omitted) (quoting *Auerbach v. Bennett*, 393 N.E.2d 994, 1000 (N.Y. 1979)).

97. *See* *Kress*, *supra* note 28, at 865-66 (discussing the *Levandusky* court's comparison of the similarities and differences between the reasonableness and business judgment standards).

the extent it permits infringement of rights and interests with little or no recourse but to relocate.⁹⁸

C. Combined Reasonableness/Business Judgment Standard

In yet another alternative, some courts have combined elements of the reasonableness standard and business judgment rule when evaluating CC&R enforcement actions. For example, in *Papalexriou v. Tower West Condominium*,⁹⁹ the New Jersey court addressed whether the board exceeded its authority in levying a special assessment against unit owners due to an emergency situation.¹⁰⁰ First, the court determined that the actions of an association board, like those of corporate directors, must be reasonable.¹⁰¹ It also concluded, however, that "[t]he refusal to enforce arbitrary and capricious rules promulgated by governing boards of condominiums is simply an application of the 'business judgment' rule."¹⁰² Consistent with the latter conclusion, the court allowed judicial review only on a showing of fraud, self-dealing or unconscionable conduct.¹⁰³ Since the decision resulted from much deliberation and the board acted in good faith pursuant to its authority, further judicial consideration was unnecessary.¹⁰⁴

In *Rywalt v. Writer Corp.*,¹⁰⁵ the Colorado Court of Appeals utilized language derived from the reasonableness standard in determining whether the board's decision to build a tennis court behind the plaintiff's property came within the scope of its general management authority.¹⁰⁶ The court ultimately applied the business judgment rule, however, refusing to enjoin construction because the record contained no evidence of arbitrary or capricious action: "Courts will not, at the instance of stockholders or otherwise, interfere with or regulate the conduct of the di-

98. See generally Gwirtzman, *supra* note 88 (noting that, although the business judgment standard helps foreclose frivolous lawsuits by deferring to decisions made by the board, it does so at the expense of protecting the interests of homeowners).

99. 401 A.2d 280 (N.J. Super. Ct. Ch. Div. 1979).

100. *Id.* at 283-84.

101. *Id.* at 285.

102. *Id.*

103. *Id.* at 286.

104. *Id.* at 286-87.

105. 526 P.2d 316 (Colo. Ct. App. 1974).

106. *Id.* at 317.

rectors in the reasonable and honest exercise of their judgment and duties.¹⁰⁷

D. All Review Standards Substantially Limit Individual Challenges

Regardless of their analytical perspective, all standards of review are, for the most part, indulgent of the exercise of authority by HOAs and their governing boards. The reasonableness standard, whether or not in combination with the business judgment rule, may vary somewhat in its formulation, but, in the majority of cases, it substantially burdens the individual's ability to challenge a particular restriction. Either the standard itself weights the equation wholly in favor of enforceability or the burden as to unreasonableness lies with the unit owner. In California, the individual must overcome both judicial obstacles. Thus, courts are unlikely to overturn a board decision except in extreme circumstances.¹⁰⁸

The business judgment rule is even more limiting because HOA decisions, regardless of their impact on daily life, are subject to judicial review only upon a showing of wrongdoing by the board. As long as the action is taken in good faith, the courts will decline to consider the matter further.¹⁰⁹ Thus, where the business judgment rule prevails, the individual is equally at the mercy of HOAs, if not more so, than where the rule of reasonableness governs. In addition, since business "judgment" includes both good and bad decision-making, unit owners have virtually no legal alternative in the case of poor judgment despite the negative consequences.

Compounding these judicial limitations, CC&Rs, as well as other association rules and regulations, are very difficult to modify. Usually, a supermajority, about eighty percent, is needed to effect any change in CID declarations and bylaws. Such levels of agreement are difficult to achieve under the best of circumstances. Disharmony is as likely a result as consensus when the subject of a proposed change involves highly personal and emotionally charged matters such as pet ownership. The absence of legal recourse or meaningful self-help alternatives calls for a legislative cure, a homeowners' bill of rights to ensure that the individual will be treated fairly.¹¹⁰

107. *Id.*

108. See Schiller, *supra* note 74, at 1133 (stating that although the reasonableness standard does protect homeowners from arbitrary and capricious rules, it still depends upon a judicial assessment of reasonableness and thus affords considerable latitude to the courts without specific guidelines to HOAs for rule-making).

109. See Note, *Judicial Review of Condominium Rulemaking*, 94 HARV. L. REV., 647, 666 (1981) (comparing reasonableness review with the corporate analogy) [hereinafter Note, *Judicial Review*].

110. Susan F. French, *The Constitution of a Private Residential Government Should*

IV. IMPACT OF CC&RS AND HOA ENFORCEMENT

Individuals purchasing units in a CID acquire the property subject to CC&Rs contained in the developer's declaration, which must be prepared and recorded prior to any sale.¹¹¹ The developer thus has tremendous, and disproportionate, impact on the eventual quality of lifestyle in the development, with owners concomitantly losing control over many everyday matters, such as maintenance of their units. The imbalance of power relative to the interests at stake is manifest: the developer, whose primary concern is to maximize financial gain, makes the initial and sole determination of which restrictions and limitations on personal activities to include in the declaration. To the extent multiple restrictions make units more salable to certain people, the developer has an incentive to include as many as the market will bear. At the same time, protection of individual interests has little economic value; hence, those who may desire a less restrictive living situation can expect little accommodation.¹¹² Since amendment or modification of the CC&Rs is difficult,¹¹³ the original restrictions usually remain intact long after the developer has departed.

Once CC&Rs are in place, HOAs have the responsibility of enforcing them. In that capacity, these organizations exert considerable influence over the bundle of rights normally considered integral to home owner-

Include a Bill of Rights, 27 WAKE FOREST L. REV. 345, 350 (1992) (suggesting that when developers draft the constitutions of private residential governments, they should include a bill of rights to ensure homeowners that they will not be divested of certain liberties by a majority vote of the other homeowners).

111. Wayne S. Hyatt & James B. Rhoads, *Concepts of Liability in the Development and Administration of Condominium and Home Owners Associations*, 12 WAKE FOREST L. REV. 915, 917 (1976). Although the CC&Rs may include restrictions on use of the property and behavior standards for owners and guests, the declaration must contain certain provisions such as voting rights and expense liabilities of unit owners. See Schiller, *supra* note 74, at 1136. For a list of typical use restrictions, see *supra* note 23. See generally MCKENZIE, *supra* note 26 (discussing community associations).

112. Barton and Silverman argue the CID structure is undemocratic from the inception because developers have undue influence over the community by creating the original declaration and CC&Rs and initially have greater voting power and therefore control over possible changes. See Stephen E. Barton & Carol J. Silverman, *Common Interest Communities: Private Government and the Public Interest Revisited*, in COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENTS AND THE PUBLIC INTEREST 31 (Stephen E. Barton & Carol J. Silverman eds., 1994).

113. In California, for purposes of altering the provisions contained in the declaration, the developer has three votes for every unit owned, and each new buyer has one vote until 75% of the units are sold and control officially passes from the developer to the new owners. See *id.* at 135.

ship.¹¹⁴ To effectuate their enforcement functions, HOAs may levy fines, impose liens on property, and even foreclose on individual mortgages.¹¹⁵ More broadly, HOAs are generally accorded "the power to adopt and amend bylaws and regulations, adopt budgets for revenues, collect assessments, institute or defend litigation, make contracts, incur liabilities, regulate the use of common elements, indemnify officers of the association, and assign rights to future income"¹¹⁶ as well as any other powers held by similar entities or those proper and necessary to discharge their authority.¹¹⁷

Under the aegis of the declaration and CC&Rs, these HOAs operate as powerful private "mini-governments."¹¹⁸ Like corporations, they have a potentially infinite life span, enjoy full legal rights with limited responsibility for the individuals who manage them, and fulfill a narrow private purpose in protecting the property values of CIDs.¹¹⁹ HOAs may also as-

114. See generally Bowler & McKenzie, *supra* note 27 (discussing the expansive power of homeowner associations). Traditionally, property ownership has afforded nearly complete independence of both lifestyle and control over structural and other aesthetic changes. Other than matters subject to code restrictions, owners need not obtain permission when deciding to make alterations or other modifications to interior or exterior elements. Thus, owners reasonably assume when purchasing an interest in a CID they have bought their *own home*. In fact they "are buying their pro-rated share of all the common elements." Miller, *supra* note 76, at 1K. Therefore, in contrast to the usual situation, CID unit owners usually must consult the board and get express approval of such changes. *Id.* In addition, because the HOA is responsible for maintenance of the development, it, not the owners, decides when and what repairs and structural changes to make and how to finance them. See Barton & Silverman, *supra* note 112, at 34.

115. See Barton & Silverman, *supra* note 112, at 135.

116. See Schiller, *supra* note 74, at 1137.

117. *Id.*; see UNIF. CONDOMINIUM ACT § 3-102(a), 7 U.L.A. 421, 501-02 (1980) (listing the powers of unit owners associations).

118. See COMMUNITY ASS'N INST., PUBLIC POLICY MANUAL, COMMUNITY ASSOCIATION MEMBERS' AND RESIDENTS BILL OF RIGHTS, 51 (1993-94) ("[T]he community association's governance is close to the individual in terms of directly affecting daily life . . . [and the] community association [has] enormous power to affect the member or resident"); Hyatt & Rhoads, *supra* note 111, at 918. As "mini-governments," "community associations often provide utility services, road maintenance, street and common area lighting, and refuse removal." *Id.*; see URBAN LAND INST./COMMUNITY ASS'N INST., MANAGING A SUCCESSFUL COMMUNITY ASS'N 3 (1974). The power of community associations to levy is their most distinctive characteristic resembling a government. *Id.* Modern political science references to corporations as governments appear as early as Arthur Bentley, who wrote in 1908 that "a corporation is a government through and through." THOMAS HOBBES, LEVIATHAN 117-18 (J. M. Dent and Sons 1976).

119. See MCKENZIE, *supra* note 26, at 122. "It is essential to remember that a [homeowner association] is a business operation, but one without a profit motive." *Id.* (citation omitted). In his text, McKenzie applies a five-part definition of private governments to CIDs: (1) an authoritative allocation of principal functions—the CID articles of incorporation; (2) a symbolic system for the ratification of collective deci-

sume responsibility for functions and services typically provided by municipalities and other local governments.¹²⁰ Yet, because legal challenges to their authority remain severely curtailed, HOAs may infringe upon the unfettered enjoyment of one's property without justifying their actions or even according individuals a modicum of due process.¹²¹

The HOA exercises its power through a board of directors, a small group of individuals selected from among the unit owners.¹²² In this respect, the organizational system of CIDs is consistent with the oligarchic structure usually found in private governments.¹²³ Given the wide range of responsibilities falling to the board of directors, including financial, legal, and maintenance decision-making, one might expect its members to be highly skilled and/or well-educated. This is not the norm, however; it is only fortuitous if members are thus qualified to serve on the board of directors.¹²⁴ CC&Rs generally require no particular level or degree of education or experience to serve.¹²⁵ In addition, some residents may be reluctant to participate due to the heavy time commitment, numerous re-

sions—the annual election to select board members; (3) an operating system of command—the board and committee structure; (4) a system of rewards and punishments—fines against members for violations; and (5) institutions for the enforcement of the common rules—hearing procedures to enforce restrictions. *See id.* at 133.

120. These services include road maintenance, sewage treatments, street and common area lighting as well as other public safety features, refuse removal, and common area maintenance and gardening; they are funded through membership dues akin to taxes. *Id.* Additionally, HOAs manage assets (sometimes totaling millions of dollars), allocate funds, and enforce restrictions through the assessment of fines. This phenomenon has been associated with the growing desire of Americans to have responsibility for their municipal and related local services assumed by private enterprise. Like local governments, HOAs may also exert control over extensive geographical areas, including many buildings and surrounding grounds. Gillette, *supra* note 23, at 1382.

121. A somewhat startling example arose in Boca Raton, Florida, where an HOA maintained a 30-pound weight limit for pets and required one resident to attend a court supervised weigh-in for his dog, who tipped the scales at 29 1/2 pounds. *See Klein, supra* note 19, at K1. In Santa Ana, California, an HOA cited a 51-year-old woman for "kissing and doing bad things" while parked in the driveway of the complex. *See id.*; David Wilman, *Woman Faces Fine for Kissing Her Date*, L.A. TIMES, June 16, 1991, at A3. *See generally* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 945-49 (3d ed. 1993) (providing a review of recent cases involving condominium homeowners associations and citing the Willman article).

122. *See generally* MCKENZIE, *supra* note 26.

123. *Id.*

124. Karen E. Klein, *How Homeowners Groups Run Series*, L.A. TIMES, Mar. 12, 1995, at K5 (pt. 3).

125. *Id.*

sponsibilities, and possibility of having to enforce restrictions against neighbors and friends.¹²⁶ This hit-or-miss, uncredentialed caliber of board membership tends to reduce its efficiency and create uncertainty and arbitrariness regarding enforcement actions.¹²⁷

Moreover, enforcement procedures often fail to meet even a minimal level of due process.¹²⁸ The board of directors passes the rules, prosecutes the alleged violators, and adjudges "guilt."¹²⁹ The individual owner can hardly rely on the HOA to evaluate its own rules and enforcement action in a neutral manner. Unit owners may not be given notice of a proposed board action or a fair opportunity to be heard.¹³⁰ Board meetings, where directors discuss the imposition of additional rules and regulations directly affecting owners' uses of their property, are often closed.¹³¹ These actions generally are not subject to neutral review either for reasonableness or fairness unless the individual has the time and money to instigate litigation.

Those residing in CIDs either affirmatively choose to live there because of perceived benefits or decide to do so primarily because of financial constraints. According to the choice theory, owners in the first category are attracted to CIDs by the wide variety of amenities and services offered.¹³² In exchange, they agree to relinquish certain rights normally associated with property ownership and accept transference of

126. *Id.*

127. See Bowler & McKenzie, *supra* note 27, at 56-57.

128. See generally Barton & Silverman, *supra* note 112 (discussing common interest communities and its undemocratic structure).

129. *Id.*

130. See Hyatt & Rhoads, *supra* note 111, at 924-925. Clearly, local government would be unable to effectuate any action against an individual in the absence of notice and hearing.

131. The importance of open meetings is recognized in California Assembly Bill No. 46, introduced by Assembly Member Hauser on December 12, 1994, which would "reorganize and expand the scope of the law relating to association board of directors meetings, by creating the 'Common Interest Development Open Meeting Act.'" A.B. 46, Cal. 1994-95 Reg. Sess. Even when meetings are open to the general membership, many declarations allow HOAs to meet with a quorum of as few as 10% of the residents present. See Hyatt & Rhoads, *supra* note 111, at 924. This minimal number contrasts sharply with the high percentage needed to modify or repeal a restriction. *Id.*

By comparison, "sunshine laws" in many states and localities ensure public access to most governmental meetings at which business similar to that of a homeowners association would be conducted. See CAL. GOV'T CODE § 54950 (West 1983) (The Brown Act); GA. CODE ANN. § 40-3301 (1975); N.C. GEN. STAT. § 143-318.2 (1974).

132. See generally Kress, *supra* note 28; Stephen E. Barton & Carol J. Silverman, *The Political Life of Mandatory Homeowners' Associations*, in RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM? 31 (Advisory Comm'n Intergovernmental Relations, 1989).

governmental functions to the private sector. Since they desire the benefits provided, for these individuals the advantages tip the scale in favor of CID living even though they necessarily become subject to the restrictions imposed by the CC&Rs and the enforcement authority of the HOA. This "choice" is sometimes illusory, however. The model assumes consumers are sufficiently knowledgeable about their alternatives to make informed decisions. Yet, studies show sales personnel are often ill-informed and many buyers remain ignorant of the full extent to which their activities may be curtailed. Most of the language in the governing documents is boilerplate and not subject to negotiation or amendment.¹³³

Others opt for CIDs because they are unable to find housing alternatives within their price range.¹³⁴ In states like California, more than half of all new non-rental housing units are located in CIDs. Thus CIDs may be the only economically viable option for owning residential property. The dramatic increase of such developments has resulted in a semi-monopoly of housing within certain price ranges.¹³⁵ For many people who buy a house in spite of, rather than because of, HOA control, the additional amenities and services that CIDs offer may not be particularly attractive, especially if the result is higher association fees. The only benefit is the opportunity for affordable property ownership. As with those in the "choice" category, these individuals likewise have no ability to mitigate the constraints on their personal lifestyle imposed by the CC&Rs and HOA enforcement actions.

The CID governing structure deprives owners of a substantial measure of independence traditionally associated with home ownership not only because it controls so many details of daily life, but also because it remains inflexible and essentially immutable. This circumstance has prompted legal scholars, commentators, and members of the public to suggest the need for some curative action, possibly in the drafting of more generalized CC&Rs or provision of a review mechanism to determine if restrictions continue to serve their intended purpose.¹³⁶ Current-

133. Dowden, *supra* note 20, at 27.

134. In general, condominium units are less expensive than single-family homes and allow home ownership with a lower down payment and lower monthly payments. See Schiller, *supra* note 74, at 1133.

135. Partly for this reason, it has been argued CIDs tend to increase segregation according to economic status. See generally Barton & Silverman, *supra* note 112 (discussing the undemocratic nature of CIDs).

136. See *id.* See generally French, *supra* note 110 (advocating the need for a home-

ly, although an owner may theoretically challenge the HOA in a lawsuit, the disparity in the parties' relative financial resources and legal positions renders this alternative unavailing in all but the most egregious cases. In some jurisdictions, including California, nonbinding arbitration is available to resolve minor disputes;¹³⁷ it is unclear, however, whether HOAs are required to participate. In any event, arbitration will not solve the problem.¹³⁸ The larger concerns at issue are whether HOAs wield disproportionate power and whether their enforcement of CC&Rs is subject to sufficient independent scrutiny. In my view, the solution lies in legislation promulgating a bill of rights to protect the interests of individual CID unit owners from the undeniable lack of accountability witnessed today.

V. PROPOSED MODEL LEGISLATION

Common interest developments are the fastest growing form of housing in the United States, in part due to the rise in housing costs relative to income.¹³⁹ The mandatory HOAs managing and controlling CIDs operate, in many instances, like city councils, collecting assessments, providing public services, enforcing CC&Rs and bylaws through fines and liens on unit property.¹⁴⁰ Because these associations are not governments,

owners bill of rights). The Community Associations Institute has even acknowledged the need for a homeowners bill of rights and established one in its Public Policy Manual for 1993-94. *See supra* note 118. The language of this document is vague, however, and it does not give any meaningful rights or redress to unit owners or residents.

137. FLA. STAT. ANN. § 718.1255 (West Supp. 1995); *see* MCKENZIE, *supra* note 26, at 132 (describing the range of alternative dispute resolution (ADR) procedures available in various states). In California, § 1354(b) of the Civil Code provides for optional binding or nonbinding ADR when a claim for monetary relief does not exceed \$5,000. CAL. CIV. CODE § 1354(b) (West 1982 & Supp. 1995). In Florida, nonbinding arbitration is a prerequisite to the filing of a lawsuit by either party. FLA. STAT. ANN. § 718.1255(4)(a) (West Supp. 1995). For a more detailed explanation of how this process works, *see* Kress *supra* note 28, at 883.

138. Arbitration is frequently ineffectual for one of two reasons: either it is nonbinding or it is mandatory only in cases of minor disputes. Owners with serious problems are left to the legal system, which may be hostile as well as expensive.

139. BARTON & SILVERMAN, *supra* note 19, at 8 (noting that in some metropolitan areas, such as San Jose and San Diego, the majority of new housing units are CIDs); MCKENZIE, *supra* note 26, at 11. As of 1992, there were 150,000 HOAs. *Id.* California has approximately 25,000, second to Florida with 40,000. *Id.*

140. Evan McKenzie, *Welcome Home, Do as We Say*, N.Y. TIMES, Aug. 18, 1994, at A15; *see* Nellie S. Huang, *Ten Things Your Homeowners Association Won't Tell You*, SMART MONEY, Dec. 1994, at 87. Huang's article relates the experience of a homeowner who lost his home to the bank when his HOA placed a lien on his property. *Id.* The HOA had fined him every month for violating the association's architectural design rules by planting too many roses in his yard and "degrading" the site. *Id.* He

their actions are subject to scant judicial review and do not have to meet any constitutional standards of reasonableness or fairness.¹⁴¹ Neither equal protection nor due process guarantees apply to the CC&Rs governing CID owners or the proceedings by which HOAs enforce them.¹⁴² As CIDs increase in popularity, so too does the need for some type of check on the power of HOAs to restrict individual interests.¹⁴³

The legislature is the most logical institution to provide this necessary restraint and protection. Although some states have already enacted statutory schemes governing some of the issues related to CIDs, they focus principally on interpretation of CC&Rs and do not address the question of specifically enumerated individual rights.¹⁴⁴ California is one such example: Civil Code section 1354 (a) concerns only enforceability of

also had to pay the association's \$70,000 legal bill. *Id.*

141. See Schiller, *supra* note 74, at 1147.

142. Note, *Judicial Review*, *supra* note 109, at 657. "There are many significant questions about the constitutionality of the 'private governments' If they are based, as most of them are, on the [homeowner] association concept, serious legal issues arise in terms of equal enfranchisement of all citizens, since most HOAs exclude lessees from membership. Thus these 'private governments' may violate the equal protection clause of the Fourteenth Amendment." MCKENZIE, *supra* note 26, at 136 (citation omitted).

143. Note, *Judicial Review*, *supra* note 109, at 652 (noting that legislatures have left government responsibilities for condominiums to the developers and HOAs).

144. Schiller, *supra* note 74, at 1138. Only a few states have statutes that establish standards for reviewing all types of CID rules and regulations; however, the standards are usually nebulous. For example, in Alabama the relevant statute states: "[T]he association may adopt, distribute, amend and enforce reasonable rules governing the administration and management of the condominium property and the use of the common and limited common elements." ALA. CODE § 35-8-9(3) (1991). This language raises the same problems generally associated with reasonableness review because it fails to make any exception for personal lifestyle activities and thus does not adequately protect the interests of individual homeowners. Some states have statutory authority requiring CC&Rs in the CID's declaration be reasonable, but these mandates do not necessarily apply to bylaws and amendments by HOAs; thus, the standard for their enforceability may remain uncertain. For example, in Nevada "the owner of a project may, prior to the conveyance of any condominium therein, record a declaration of restrictions relating to such project, which restrictions shall be enforceable equitable servitudes where reasonable." NEV. REV. STAT. § 117.060 (1986). Maryland has statutory authority requiring HOAs to follow certain procedural requirements when enacting regulations amending the declaration or bylaws. The requirements include giving at least 10 days' notice to unit owners stating the nature of the proposed regulation. MD. REAL PROP. CODE ANN. § 11-111 (1988). Under the Uniform Condominium Act, HOAs can "adopt and amend bylaws and rules and regulations," but the Act does not articulate the standard by which enforceability should be determined. 42 U.S.C. § 3604 (1988).

CC&Rs as equitable servitudes “unless unreasonable.”¹⁴⁵ This broad provision allows for a potentially infinite variety of restrictions to be put in place even before the first owner takes up residence in a CID. Subsequently enacted bylaws are probably governed by this standard as well. Given the very real possibility of encroachment into areas of personal lifestyle, this language requires some tempering to ensure certain individual interests are preserved from majoritarian control.

Several legal scholars have echoed the call for a standard of review more solicitous of personal freedoms than the rule of reasonableness presently applied by the courts. Evan McKenzie, an advocate of homeowners’ rights, points out in his book, *Privatopia, Homeowner Associations and the Rise of Residential Private Government*,¹⁴⁶ that the CID movement, especially the Community Associations Institute,¹⁴⁷ significantly influenced the drafting of current legislation, including the Davis-Stirling Common Interest Development Act.¹⁴⁸ As a result, the businesses that serve HOAs and their lobbyists have shaped the law to the disadvantage of individual homeowners.¹⁴⁹ In McKenzie’s view, Congress should take action to rectify this imbalance.

McKenzie originally criticized the standard of enforceability codified in section 1354 of the California Civil Code as too vague because it gave no guidelines for determining reasonableness, thus inviting litigation as residents challenged restrictions they claimed infringed on their private lives.¹⁵⁰ Following the *Nahrstedt* decision, the standard is no longer vague: CC&Rs are presumptively valid, and the homeowner bears the burden of proving a restriction unreasonable on its face.¹⁵¹ In exchange for a clear standard that favors enforceability, the individual loses all

145. CAL. CIV. CODE § 1354(a) (West Supp. 1995).

146. See *supra* note 26.

147. The Community Associations Institute (CAI) is a “national, nonprofit association created in 1973 to educate and represent America’s residential community association (CA) industry.” COMMUNITY ASSOCIATIONS INSTITUTE SPRING CATALOG 4 (1995).

148. See MCKENZIE, *supra* note 26, at 163. McKenzie explains that CID association forces have been successful in resisting judicial and legislative action that would treat HOAs as governmental entities and in reducing the potential liability of board members in lawsuits filed by homeowners, developers, and others. *Id.* He also describes how the legislative task force that produced the Davis-Stirling Act was composed mainly of legal advocates for CIDs, with no other interest groups having as much influence over the drafting of the legislation. *Id.*

149. Klein, *supra* note 124, at K6. Klein describes how HOAs, operating essentially as large-scale businesses, must employ an array of professionals, including attorneys, bankers, property managers, accountants, and landscapers, to aid them in running their communities. *Id.* Indicative of their power, these HOAs control large amounts of revenue, with approximately \$28 billion in reserve funds nationwide. *Id.*

150. MCKENZIE, *supra* note 26, at 169; see Huang, *supra* note 140, at 88 (noting that in California, 75% of HOAs are involved in some type of litigation).

151. *Nahrstedt*, 878 P.2d at 1286.

ability to challenge a particular application as unreasonable under given circumstances.¹⁵² If McKenzie saw the need for legislative intervention before *Nahrstedt*, its judicial imprimatur on virtually all CC&R enforcement actions now sounds the clarion call.

Linda French has also advocated a homeowner bill of rights in her article, *The Constitution of a Private Residential Government Should Include a Bill of Rights*.¹⁵³ She emphasizes that in creating the original declaration, a developer's first priority is to sell the property profitably with only secondary consideration to the interests of individual homeowners.¹⁵⁴ The current trend in these declarations is to accord the HOA substantial authority over not only the common areas, but also individual units.¹⁵⁵ This practice has generated well-grounded fears that homeowners will lose control over their lifestyles. French proposes a bill of rights in the declaration to guarantee homeowners that neither the HOA nor a majority of other owners will be allowed to pass regulations infringing personal liberties in this manner.¹⁵⁶

Complementing my criticism of the majority's application of Civil Code section 1354 in *Nahrstedt*, I am now proposing model language that will address the serious and legitimate concerns that HOA enforcement of CC&Rs has occasioned.¹⁵⁷

152. *Id.* at 1288.

153. *See generally* French, *supra* note 110 (advocating a homeowner bill of rights).

154. *See id.* at 347.

155. *Id.*

156. *Id.* at 351 (proposing that the bill of rights should include provisions specifically addressing equal treatment, speech, religious and holiday displays, household composition, activities within individually owned property, pets, alienation, and allocation of burdens and benefits).

157. This language derives from similar legislation now pending in the Maryland General Assembly. *See* H.B., 651, 1995 Md. Leg. Sess.

Introduced by

January 1, 1996

An act to add Section 1354.5 to the Davis-Stirling Act, relating to common interest developments.

LEGISLATIVE COUNSEL'S DIGEST

Under existing law, the covenants and restrictions in the declaration of a common interest development shall be enforceable equitable servitudes, unless unreasonable.

This is an act concerning Condominium and Homeowners Association restrictions for the purpose of prohibiting certain provisions in the recorded covenants and restrictions, declarations, bylaws, and rules of certain condominiums or homeowners associations that restrict the use or maintenance of units or common elements without certain justification or in a manner that denies certain civil rights, and generally relating to the recorded covenants and restrictions, declarations, bylaws, and rules of condominiums, and homeowners associations.

This bill would include rules and regulations passed by associations that are not in the common interest development's declaration. These rules cannot restrict activities in one unit or in the common areas if they deny a civil right guaranteed by the Federal or State Constitution or by any federal, state, county or local statute, ordinance or regulation.

The people of the State of California do enact as follows:

1 **SECTION 1. BE IT ENACTED BY THE STATE OF**
2 **CALIFORNIA, that the Laws of California read as follows:**

3 **ARTICLE — REAL PROPERTY**

4 A recorded covenant, condition or restriction, a provision in a
5 declaration, or a provision of the bylaws or rules of a common
6 interest development may not restrict the use or maintenance of a
7 unit or the common elements:

- 8 (1) Without reasonable justification, based on economic,
9 aesthetic, health, or safety considerations; or
10 (2) In a manner that denies a civil right granted or
 guaranteed
11 under the United States Constitution, the California Constitution, or
12 a federal, state, county, or local statute, ordinance or regulation.

If similar legislation had been enacted when Natore Nahrstedt moved into Lakeside Village with her three cats, her battle with the Association would most likely have taken a different turn.¹⁵⁸ The proviso that CC&Rs and bylaws "may not restrict the use or maintenance of a condominium unit . . . without reasonable justification" places the burden on the HOA to demonstrate reasonableness based on economic, aesthetic, health or safety considerations. Moreover, even if the HOA can defend a restriction as reasonable in the abstract, this legislation does not prevent the unit owner from challenging it based on individual circumstances. Since Nahrstedt's cats created no nuisance, did not threaten the quiet enjoyment of other residents, and did not otherwise impair community interests of Lakeside Village, the Association could not have justified their exclusion as reasonable.

VI. CONCLUSION

The burgeoning popularity of common interest developments in recent decades has placed personal freedoms and lifestyle interests on the endangered species list. Because the developer, who has only an economic motivation, controls the content of the declaration and the specifics in the CC&Rs, both those who are attracted to CIDs for their amenities and those who purchase for financial reasons are extremely limited in their capacity to negotiate changes or otherwise alter burdensome restrictions. The threat to individual interests arises first from the relatively lenient standards for determining the validity of CC&Rs and second from the virtually unrestrained power of HOAs to enforce compliance. While HOAs function like self-contained governments, they remain largely unaccountable for the manner in which they discharge their authority.

158. See *Nahrstedt v. Lakeside Village Condominium Ass'n*, 878 P.2d 1275 (Cal. 1994) (en banc).

In the *Nahrstedt* decision, the California Supreme Court divined a legislative intent to elevate uniformity of application over consideration of whether the owner's "transgression" actually impaired the viability of community life.¹⁵⁹ By rejecting an "as applied" standard, the court not only tipped the scales in favor of stability and predictability of enforceable common interests, it created a major imbalance between those interests and the personal freedoms considered an integral part of residential property ownership.¹⁶⁰ The court in *Nahrstedt* thus enhanced and augmented the substantial power HOAs already enjoy with no countervailing check on the exercise of that power.

The model legislation I propose is intended to address these concerns by establishing some semblance of balance between community and individual interests. While the stability of CIDs both in terms of quiet enjoyment and economic investment remains an important and worthy consideration, it should not come at the expense of the personal freedoms Americans traditionally expect to enjoy in their own homes.¹⁶¹ If enacted into law, such legislation will provide a minimal level of protection for those expectations and ensure an adequate measure of consideration for lifestyle choices.

Balkanization of owners and tenants is a risk now reasonably foreseen under empowered bureaucratic regimes that suffocate liberty, moving dynamically from tranquility to threat to compulsion. As custodians of tradition entering the millennium, our duty in avoidance is to encourage instead a hymn to harmony and a paean to peaceful coexistence.

159. *Id.* at 1288.

160. *Id.*

161. "For a man's house is his castle, and one's home is the safest refuge to every-one." SIR EDWARD T. COKE, 3 INSTITUTES OF THE LAW OF ENGLAND 161 (William S. Hein & Co. ed., 1986) (Latin omitted) (old English paraphrased).